IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal NO.183 OF 1999 .

Badshah Hasan Saheb
at present lodged in
Yeravada Central Prison,
Pune 6.
(Convict No.C-10306) ..Appellant/
Original Accused

Versus

The State of Maharashtra ..Respondent

Mr.A.G.Toraskar, Advocate appointed for the appellant

Smt.V.R.Bhosale, APP for the State

CORAM: S.B.MHASE &
S.R.SATHE, JJ.

DATE : 19th August, 2005

ORAL JUDGMENT (Per S.R.Sathe, J.)

1. Appellant, the Original accused in Sessions Case No. 792 of 1995 has preferred this appeal against the Judgment & Order passed by the Court of Additional Sessions Judge, Brihan Mumbai, whereby the accused was convicted for the offence punishable under Section 302 of I.P.C. and sentenced to suffer imprisonment for life and to fine of Rs.500/- i.d. to suffer R.I. for three months.

2. Brief facts giving rise to this appeal are as under:

. The Appellant as well as accused were serving

in one social institution by name Spark situated at Agripada. One P.L.Chavan, the complainant in the instant case was also serving there. The said institute used to look after the orphan children.

3. On 10.10.1994 at about 7.15 a.m. the complainant P.L.Chavan and some boys were in the room. At that time complainant heard some shouts. He found that Badshah i.e. the present accused was running away from the said place. He, therefore, went to the said place. He found that one knife was lying there and Naresh deceased in the present case was sitting there in injured condition. He told him that Badshah assaulted him with knife and ran away. By that time some other persons caught Badshah and took him to the said place. The Complainant and other persons thereafter took Badshah and the injured Naresh in a taxi to Agripada Police Station and handed over Badshah to police and took Naresh to Nair Hospital. As the complainant lodged complaint Exhibit 6, wherein he clearly named the present accused as assailant, the police arrested the accused and registered the offence initially under section 307 of I.P.C. The injured was operated at 8.45 a.m. In the mean time, the police officer who had recorded the complaint also visited the hospital and recorded the dying declaration of Naresh. The police, after arrest of the accused, attached the clothes which were on the person of the accused and also visited the place of offence and drew the spot

panchanama and attached the knife which was lying there. The injured however sucumbed to the injuries sustained by him. The attached articles were then sent to C.A. After obtaining the C.A. report and recording the statements of the witnesses and completion of investigation, the police submitted charge-sheet against the accused in the Court of the Metropolitan Magistrate, Mumbai. Finding that the accused is facing charge which is exclusively triable by the Court of Sessions, the learned Metropolitan Magistrate committed the case to the Sessions Court, Mumbai.

4. The Additional Sessions Judge, Mumbai framed charges Exhibit 1 against the accused for the offence punishable under Section 302 of I.P.C. The charge was read over and explained to the accused. He pleaded not guilty and claimed to be tried. His defence was of total denial. From the suggestions put to the P.W.'s as well as from the statement of the accused recorded under Section 313 Cr.P.C. it appears that it is the defence of the accused that at the relevant time when he heard the shout he went inside the room and he found that the injured was lying there and had sustained bleeding injuries. He, therefore, went near him to help him. On that, the injured caught his shirt, he got afraid and therefore started running. While doing so, Prashant Chavan caught him and then he with the help of others took him to police station. Thus, it is his defence that he has been falsely involved in the

case.

5. In order to bring home the guilt of the accused, the prosecution examined in all 10 witnesses and also produced certain documents, reference to which will be made as and when necessary.

6. After considering the evidence adduced by the prosecution, the learned trial Judge came to the conclusion that the accused is guilty of the offence punishable under Section 302 of I.P.C. He, therefore, convicted and sentenced the accused as mentioned above.

7. Being aggrieved by the same, the appellant has filed the present appeal. In this appeal before us, Shri Toraskar, the learned Advocate for the accused has urged three points. Firstly, he submitted that the learned trial Judge has not properly appreciated the evidence on record and has wrongly relied upon the dying declarations. Secondly, he submitted that the learned trial Judge ought to have taken into consideration the fact that Prashant L. Chavan who has filed the complaint and who was infact the material witness was not examined. Lastly, he submitted that the evidence of P.W.2, 3 and 4 is also not consistent and there are some discrepancies with regard to the time of the alleged incident. He, th4refore submitted that benefit of doubt ought been given to the accused. As against this, learned APP Smt. Bhosale supported

the judgment and order passed by the trial Judge.

8. It is not in dispute that on the day of the incident, at about 7.15 a.m. when the injured was lying in the room of Spark Institution, he had sustained grave stab injuries to his stomach and he was taken from the said place in a taxi to Nair Hospital. Admittedly, at hospital history of assault was given and thereafter he was operated. The prosecution has produced the post-mortem notes at Exhibit 22. From the perusal of the same and in particular from the column No.17 & 18 it is very clear that the injured had sustained stab injury to his stomach. The death was caused as a result of the stab injury. Thus, it is very clear that the death of Naresh was homicidal.

9. The main and the material question is whether the death has been caused at the hands of the present accused.

10. In order to bring home the guilt of the accused, the prosecution has mainly relied on the evidence of P.W.1, 2 and 3. Admittedly they are not the eye witness and the case rests on the circumstantial evidence. The law with regard to circumstantial evidence is well established and it is needless to say that in such type of cases it is necessary for the prosecution to establish each and every circumstance and must also bring clear and cogent

evidence to show that the said circumstantial evidence is not consistent with the innocence of the accused. The circumstances must also unerringly point out the guilt of the accused.

11. At the outset it must be mentioned that admittedly the accused was caught at the place of offence and from there he was taken to the police and then to hospital. It is also an admitted fact that when he was caught, his clothes were blood stained. It is true, that it is his version that when he saw the injured lying in the room he went near him to help him and at that time the injured had caught his shirt. It is also his case that as he travelled in the taxi alongwith the injured, there were blood stains on his clothes. However, it is very difficult to accept this version. Firstly because, if really the accused had seen the injured lying in such a condition in the room then normally he would have called some other persons for help, but instead of that we find that according to him he went near the injured and then started running away from the said place. The other witnesses, namely P.W.2 Mohammed Sattar, Exhibit 13 has also stated that on the day of incident, in the morning he saw accused Badshah running away by the side of the dispensary and as such he chased him and caught him. The evidence of this witness is not at all shaken or shattered in the cross examination and there is absolutely nothing on record to indicate that there was any enmity between

this witness and the accused. On the contrary, the said witness has stated that he saw the accused on that day for the first time. So, it is very clear that there was absolutely no reason for this witness to name the accused and specifically state that at the relevant time he had chased the accused and caught him at the said place. Shri Toraskar, learned Advocate for the accused submitted that this witness has stated that the incident with regard to accused running away took place at about 9.00 to 9.15 a.m. and this itself is sufficient to discredit his testimony. However, it must be noted that it may happen that the said witness may not be quite aware about the time at which the said incident took place. Besides this, there is every possibility that the witness might have committed some error in mentioning the time. But merely because instead of 7.30 a.m. he has said 9.15 a.m. we can't jump to the conclusion that his testimony is not trustworthy. So, from the evidence of this witness also it is very clear that the accused was seen by this witness running away from the said place.

12. Similarly, P.W.3 Moiddin Shamshuddin Shaikh, Exhibit 14 has also stated that on the day of the incident at the relevant time when he was infront of his house he saw the injured sitting near the dispensary and at that time he was removed in a taxi by Prakash and the assailant was also there. The evidence of this witness is also not seriously challenged. No

suggestion has been put to him that he was having any grudge or grievance against the accused and as such he has falsely involved the accused. There is another important prosecution witness namely Samina Mohammad Waris Ansari, Exhibit 15 who has also stated that on the day of the incident at about 7.30 am she heard the shouts and when she rushed towards the dispensary, she found accused running away from the said place with knife in his hand. Shri Toraskar, learned Advocate for the accused submitted that in the instant case the knife is infact attached from the place of offence and as such the version of this witness that she had seen the accused running away from the said place with knife in his hand cannot be accepted. It is true that the knife in the instant case has been attached from the place of offence and the statement of this witness that she had seen the accused with knife in his hand is not correct. But her evidence is not only to that effect, but she has also stated that at the relevant time when she saw the injured in the room, he was saying that Badshah assaulted him and ran away. So, any way there is oral dying declaration wherein the injured has named the accused as his assailant.

13. Another important piece of evidence on which the prosecution is relying is the dying declaration recorded by the witness Pravin Pratap Shinde- Exhibit 5. It was tried to be suggested on behalf of the defence that the said dying declaration cannot be

relied upon as the same has been recorded by the Police officer. However, there is no rule of law that the dying declaration recorded by the Police Officer cannot be relied upon in any circumstances. On the contrary, there are various authoritative pronouncements wherein it has been clearly said that when it is not possible to record dying declaration through Special Judicial Magistrate or through some other person immediately then in such situation dying declaration can be recorded by the police officer, and the same can be accepted provided it appears that it is voluntary, genuine and truthful. In the instant case, if we take into consideration the time at which the injured was taken to the hospital, the time he was operated and the time at which he succumbed to the injuries, it is very evident that there was no sufficient time to get the dying declaration recorded by the Magistrate. So, under the circumstances, if the Police Officer has recorded the dying declaration it cannot be discarded on the ground that the same is not recorded by the Magistrate. On the contrary, if we peruse the dying declaration exhibit 7 then it appears that before recording the dying declaration the PSI had taken care to see that at the relevant time the injured was in a position to make statement and for that purpose he had obtained necessary endorsement from the doctor on duty. Not only that, but the prosecution has also examined Dr. Siddharth Nivrutti Gajhas exhibit 30, who has also stated that at the relevant time he examined the

patient and he found that patient was in a position to give statement and as such he made the necessary endorsement. There is nothing in the cross examination of P.W.1 Pravin Shinde to indicate that the dying declaration in question is not genuine or truthful. In the dying declaration the injured has specifically stated that on the previous day the accused was teasing him. However, he had not given any heed to it and when on 10.9.1994 at about 7.15 a.m he was in the said institution, accused Badshah came towards him and stabbed on his stomach and ran away. There is nothing on record to show that there was serious conflict between the injured and the deceased and as a result of which the injured would falsely implicate the accused leaving aside the real culprits. So, under such circumstances, due weightage shall have to be given to the dying declaration which is recorded soon after the incident and appears to be true and genuine.

14. So, taking into consideration this written dying declaration coupled with oral dying declaration made before the above two witnesses, one can safely hold that the prosecution has proved beyond reasonable doubt that the accused gave a blow with knife on the stomach of the injured and thereby caused his death.

15. Much is made about the fact that the prosecution has not examined P.L.Chavan the complainant. However, from the perusal of the record

and in particular from the statement of the Investigating Officer, Rathod, it does appear that an attempt was made to examine P.L.Chavan, however, as he was not traced he could not be examined. The question arises whether non examination of the complainant in the instant case is sufficient to raise a doubt about the prosecution version. While considering this aspect one must keep in mind that admittedly the accused was caught at the place of offence and at that time there were blood stains on his shirt and there were other persons who had also seen the accused running away from the said place. Not only that, but the injured had also disclosed the name of the accused as his assailant. So, under the circumstances, merely because the complainant P.L.Chavan is not examined we are not inclined to hold that his non examination is fatal to the prosecution. Tt is evident that this is not a case where the prosecution has deliberately suppressed any particular witness or the complainant. Had it been so, it would have been a different thing. It is merely because the witness was not available he has not been examined. So, under such circumstances, adverse inference cannot be drawn against the prosecution.

15. If we take into consideration the evidence as regard to the C.A. report in the background of the above mentioned evidence then also it has to be said that the said evidence is clinching because as per the C.A.Report, exhibit 25 & 26 the blood stains which were

found on the knife were of "A" group. The blood group of the deceased was and blood of A group was also found on the shirt of the accused. The blood group of the accused is B. So, under such circumstances, it was necessary for the accused to give satisfactory explanation about the blood stains of A group on his clothes. However, in his statement under Section 313 he has not given any explanation but in written say Exhibit 36 an attempt was made to show that as he had gone near the deceased to help him and deceased caught his shirt and thereafter he had travelled with the deceased in a taxi to the hospital and as such there was possibility of having such blood stains on the clothes of accused. However, as mentioned earlier this explanation does not appear to be trustworthy under the circumstances of the case. So, when we find that the blood found on the clothes of the accused tallies with the blood group of the deceased as well as on the knife it has to be said that this circumstance also lends support to the prosecution version.

16. Thus, it appears that the learned trial Judge has taken into consideration all the facts and circumstances and in its proper perspective while coming to the conclusion that the accused has committed the murder of Naresh. The finding recorded by the trial court is legal and correct and there is no necessity to interfere with the same. Hence the appeal is dismissed.

17. The fees of the appointed advocate are quantified to Rs.1000/- (Rupees One Thousand Only).

(S.R.Sathe, J.) (S.B.Mhase, J.)